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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS DIPARRA,

Defendant and Appellant.

D060646

(Super. Ct. No. SCD233317)

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed.

INTRODUCTION

After the trial court indicated it would consider dismissing a strike and sentencing him to between four and six years in prison, Jose Louis Diparra pleaded guilty to failing to register as a sex offender (Pen. Code, § 290.018, subd. (b))¹ and admitted having two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12). Although the prosecution did

¹ Further statutory references are also to the Penal Code unless otherwise stated.

not agree to a plea bargain, after Diparra's guilty plea, the prosecution requested dismissal of another charge and a prior prison allegation, which the trial court granted.

At the sentencing hearing, consistent with its indication, the trial court dismissed a strike and sentenced Diparra to six years in state prison. The court also ordered Diparra to pay various fines and fees, including a \$10,000 restitution fine (former § 1202.4, added by Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010)² and a \$154 criminal justice administration, or booking fee (Gov. Code, § 29550.1).

Diparra appeals, contending we must vacate the restitution fine and booking fee because the trial court failed to consider his ability to pay before imposing them. We conclude these contentions lack merit and affirm the judgment.

BACKGROUND

According to the probation officer's report, in 1984 Diparra pleaded guilty to two counts of committing lewd and lascivious acts with a child under 14 (§ 288, subd. (a)). Because of this conviction, he is required to register as a sex offender for the rest of his life. He has three prior convictions, one in 1996, one in 2006, and one in 2007, for failing to comply with the registration requirement. On March 3, 2011, Diparra was released from prison on parole for the 2007 offense. He never reported to the parole office and never registered as a sex offender. Almost a month after his release, San Diego Harbor Police arrested Diparra after a citizen reported seeing him in a park area frequented by drug users and living in some bushes across from an elementary school.

² Further references to section 1202.4 are to this version of the statute.

Diparra states he has military service-connected posttraumatic stress disorder. At the time of his arrest, Diparra was 63 years old, homeless and unemployed. He had no source of income, no assets and no debts. He previously worked in the fiberglass industry for over 20 years and also in the shipyards. A psychologist who evaluated him for the sentencing hearing noted he is eligible for benefits and support from the United States Department of Veterans Affairs (VA). Diparra indicated to the probation officer he was considering seeking help through the VA upon his release from custody.

DISCUSSION

I

Bars to Appellate Review

A

Certificate of Probable Cause

When Diparra filed his notice of appeal, he requested a certificate of probable cause, but the trial court denied his request. The People contend Diparra's failure to obtain the certificate requires us to dismiss his appeal. We disagree.

Before a defendant may appeal a conviction based on a guilty plea, the defendant must obtain a certificate of probable cause from the trial court. (§ 1237.5.) A defendant need not obtain a certificate of probable cause, however, if the defendant's appeal is based on the denial of a motion to suppress evidence under section 1538.5, or on grounds that arose postplea and do not affect the plea's validity. (Cal. Rules of Court, rule 8.304(b)(4); *People v. Johnson* (2009) 47 Cal.4th 668, 676-677 (*Johnson*).)

As sentencing occurs postplea, a defendant does not need a certificate of probable cause to raise a sentencing claim on appeal unless the claim attacks the plea's validity. (*Johnson, supra*, 47 Cal.4th at p. 678; *People v. Cuevas* (2008) 44 Cal.4th 374, 379.) An attack on the plea's validity occurs when the sentencing claim involves "an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement." (*Johnson*, at p. 678.) It does not occur when the sentencing claim involves an aspect of sentence the plea agreement left open for resolution by the trial court's exercise of its normal sentencing discretion. (*People v. Buttram* (2003) 30 Cal.4th 773, 785.) Consequently, "when the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was 'part of [the] plea bargain.' [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself." (*Id.* at p. 786)

In this case, Diparra received notice through the guilty plea form he signed that, as a consequence of his plea, he could receive a restitution fine of between \$200 and \$10,000.³ The parties did not discuss this consequence or the booking fee during the plea colloquy, and they did not agree to specific or recommended fines or fees in exchange for Diparra's guilty plea. In fact, the parties did not enter a plea agreement at all. Rather, Diparra pleaded guilty in response to the trial court's indication it would consider dismissing a strike and sentencing him to between four and six years in prison. The imposition of the restitution fine and the booking fee, therefore, was left to the trial

³ The form does not mention the booking fee or similar fees.

court's discretion. (See *People v. Villalobos* (2012) 54 Cal.4th 177, 183 [a restitution fine is set at the trial court's discretion when it is not mentioned in a plea agreement or during the plea colloquy].) As Diparra's sentencing claims do not involve matters to which he agreed as an integral part of a plea agreement, his claims do not attack the plea's validity and he was not required to obtain a certificate of probable cause to raise them.

B

Forfeiture

The People also contend Diparra forfeited his right to challenge the restitution fine and booking fee on appeal by failing to object to them below. There is a split of authority on the issue of whether the forfeiture doctrine applies to challenges to fines and fees. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [holding forfeiture doctrine inapplicable]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [holding forfeiture doctrine applicable]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467-1468 [holding forfeiture doctrine applicable].) The California Supreme Court is currently reviewing the issue. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) Assuming without deciding Diparra has not forfeited his challenges, we conclude they lack merit.⁴

⁴ Given this assumption, we need not address Diparra's ineffective assistance of counsel claim.

II

Ability to Pay

A

Restitution Fine

"In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (§ 1202.4, subd. (b).)

Where a defendant is convicted of a felony, the fine shall be set between \$200 and \$10,000, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).)

Diparra asserts we must reduce his restitution fine to the \$200 statutory minimum because there is insufficient evidence in the record to support a finding he has the ability to pay more than the minimum fine.

In setting the fine above the minimum "the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime." (§ 1202.4, subd. (d).) The court may not consider a defendant's inability to pay a compelling and extraordinary reason not to impose a restitution fine. It may only consider the defendant's ability to pay in increasing the fine above the statutory minimum. (§ 1202.4, subd. (c).)

Further, a court is not required to make express findings as to the factors bearing on the amount of the fine (§ 1202.4, subd. (d)), and because the defendant bears the burden of demonstrating an inability to pay, the defendant is impliedly presumed to have an ability to pay unless the defendant adduces contrary evidence. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.) As Diparra did not adduce contrary evidence, this presumption precludes us from concluding there is insufficient support for the trial court's decision.

Even without the presumption, however, we conclude the record adequately supports the trial court's decision. When determining a defendant's ability to pay, the trial court may consider future earning capacity. (§ 1202.4, subd. (d).) The record shows Diparra has a high school diploma, an associate's degree, specialized job skills, and a lengthy work history, indicating he has the ability to obtain employment when he is released from custody. Even if he is unable to obtain employment, he will be of an age to be eligible for social security retirement benefits, and perhaps retirement benefits from his past employment. He is also eligible for VA benefits.

Although Diparra was homeless and unemployed at the time of his arrest, he had been out of custody for less than a month and, according to him, he had been unable to establish himself because he was trapped out of the country without identification for most of that time. Such unusual circumstances do not compel a conclusion Diparra will necessarily lack the capacity to pay the fine in the future. Accordingly, Diparra has not persuaded us the trial court erred in imposing the maximum restitution fine.

B

Booking Fee

Diparra similarly contends we must vacate the booking fee because there is insufficient evidence in the record he has the ability to pay it. As Diparra acknowledges, Government Code section 29550.1,⁵ the statute authorizing the fee in this case, does not expressly require an ability to pay finding before the trial court may impose the fee. Diparra nonetheless argues we must read such a requirement into the statute to avoid an equal protection violation because two similar statutes within the same statutory scheme, Government Code sections 29550, subdivisions (c) and (d)⁶ and 29550.2, subdivision (a),⁷ contain such a requirement.

⁵ Government Code section 29550.1 provides, "Any . . . local arresting agency whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the . . . local arresting agency for the criminal justice administration fee."

⁶ Government Code section 29550, subdivisions (c) and (d) provide: "(c) Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the offense for which the person was originally booked. . . . [¶] (d) When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: [¶] (1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt. [¶] (2) The court shall, as a condition of probation, order the convicted person, *based on his or her ability*

" ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' [Citation.] 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for the purposes of the law challenged.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Assuming, without deciding, equal protection principles apply and require us to imply an ability to pay requirement into Government Code section 29550.1, we conclude there is sufficient evidence in the record to support a finding Diparra had the ability to pay the fee. As previously discussed, the record shows Diparra has future earning capacity based on his education, job skills, and past employment history. In addition, he is eligible for VA benefits and, upon his release from custody, he will be of an age to

to pay, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Italics added.)

7 Government Code section 29550.2, subdivision (a), provides: "Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in [Government Code] Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. . . . *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee." (Italics added.)

receive social security retirement benefits and perhaps other retirement benefits.

Accordingly, Diparra has not demonstrated the trial court erred in imposing the booking fee.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

McDONALD, J.